FLH LCT Services Sdn Bhd & Anor v Malaysian Debt Ventures Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02 (MUA)(W)-704–04 OF 2014
VARGHESE GEORGE, AHMADI ASNAWI AND PRASAD ABRAHAM JJCA
13 NOVEMBER 2015

Banking — Banks and banking business — Banking facilities — Bai al-Inah — Loan for purpose of construction and developing data centre facility — Default of repayment but bank allowed financing to be rescheduled — Notice to recall — Whether underlying asset in Bai al-Inah transaction existed

Pursuant to the letter of offer dated 16 February 2009 ('the first LO') the respondent had granted the first appellant Bai al-Inah financing facility with a ceiling limit of RM9.5m ('the principal sum'). The respondent agreed to sell its asset to the first appellant for a staggered payment of RM14,233,200 ('the sale price') and the respondent shall repurchase the said asset for RM9.5m ('the purchase price'). The said purchase was subject to the terms and conditions contained in the first LO, the master facility agreement ('MFA'), deed of assignment, ('DOA'), debenture, asset sale agreement ('ASA') and asset purchase agreement ('APA') and the supplemental LO ('the second LO'). The first appellant agreed to accept the respondent's offer subject to the terms and conditions contained in the above said agreements. The Bai al-Inah facility was for the purpose of constructing and developing a data centre facility and the first appellant was to pay profit rate for the said financing at 7%pa calculated at daily rest to be calculated 12 months in advance for the first year. The profit for the following years shall be paid quarterly in advance. The first appellant had agreed to pay the principal sum by way of instalments effective from the 10th month from the date of disbursement. The second appellant had unconditionally and irrevocably guaranteed the due performance of the first appellant's obligations under the above said contracts/agreements pursuant to a personal/joint and several guarantee executed by the second appellant. The second appellant agreed to pay and settle all sums due and payable by the first appellant to the respondent, on demand subject to the terms and conditions stipulated in the said guarantee; and to indemnify and keep indemnified the respondent all fees, costs, charges, damages and all liabilities incurred in the course of obtaining and seeking to obtain payments from the appellants. Pursuant to item 11 Schedule 1 of the first LO, the 10th month would be the month of May 2010. The first appellant though did not make any payment of the principal sum on time as stated in the above Schedule 1. The first appellant only made the first payment in the sum of RM80,000 on 27 July 2010 and the

second payment amounting to RM40,000 on 4 August 2010. Apparently an event of default had occurred and the respondent was entitled to stop further payments of the funds pursuant to the agreements. The respondent had still allowed the said financing to be rescheduled, vide the second LO, agreed and signed by both parties. The payment of the principal sum was rescheduled to commence on 31 August 2011. Following the second LO, a subsequent sum amounting to RM3,206,189 was disbursed to the appellants. The terms of the second LO also provided that the final sum of RM1,437,851 could only be disbursed once the Data Centre was completed upon receipt of the approval from the local authority on the conversion of land and upon acceptance of the certificate of fitness to occupy the premises. Despite having been allowed to reschedule its monthly repayment and despite further disbursements made pursuant to the second LO, the first appellant failed and neglected to pay the monthly instalments as agreed in the first and second LO. The respondent then caused a notice to recall to be issued to both the appellants dated 18 July 2012. Despite a valid demand having been issued both the appellants had refused to comply with the said recall notices, thus prompting the respondent to institute this civil action against both the appellants. In the High Court, the respondent claimed against the first appellant being the principal borrower and the second appellant/second defendant, the guarantor, for the recovery of monies due and payable. The High Court judge allowed the respondent's claim and dismissed both the appellants counterclaim and awarded RM50,000 costs to be paid by the appellants to the respondent. Hence the present appeal. The appellants submitted that the underlying asset in the Bai al-Inah transaction did not exist.

Held, allowing the appeal with costs:

(1) The essence of Bai al-Inah transaction or contract in the matter entered into by the parties must necessarily be grounded upon the basic premise that it must involve the sale and buy back transactions of an asset of a seller. The existence of the asset in the transactions was an imperative without which such contract was not a Bai al-Inah contract, but something else outside the Shariah system (see para 25).

(2) The Mudharabah General Investment Certificate attached to the inter-office memo could not have been the asset transacted on account that, firstly, the same was not mentioned in the LOs, the MFA, the ASA and APA. Neither was there any indication that the said certificate was intended to be the asset in the said transactions. Secondly, it was attached to an inter-office memo which was obviously for internal circulation only. Being an inter-office memo, it was doubtful whether the appellants had access to the same (see paras 33–34).

(3) The certificate was issued on 26 May 2009 and dated 13 July 2009. Obviously it pre-dated the execution of the MFA, ASA and APA. As such if the certificate was intended to be the asset in the said transactions, then

the parties should encounter no difficulty in naming the same as the asset in the MFA, ASA and APA. Obviously this was not done. It was also obvious that at the time of the first LO this asset had yet to come into being. Otherwise it would have been stated in the first LO. The said certificate was also endorsed with the endorsement 'TIDAK BOLEH DIPINDAHMILIK' (NOT TRANSFERABLE). In such event, the ownership of the asset could not be transferred to the purchaser (see para 34).

(4) What had transpired obviously had violated the entrenched principles of Bai al-Inah contract which the learned judge herself had alluded to. It was neither Shariah compliant. As such it is not a Bai al-Inah financing contract but something else unknown in the Shariah financing system. Hence, the respondent's remedy was also elsewhere and not under the Bai al-Inah financing system. The respondent could not take advantage of the system when the contract they entered into was unknown in the system (see para 35).

[Bahasa Malaysia summary

Berikutan kepada surat tawaran bertarikh 16 Februari 2009 (LO pertama) responden telah memberikan perayu pertama kemudahan pembiayaan Bai al-Inah dengan had sebanyak RM9.5m (jumlah utama). Responden bersetuju untuk menjual asetnya kepada perayu pertama dengan bayaran ansuran sebanyak RM14,233,300 (harga jualan) dan responden akan membeli semula aset tersebut sebanyak RM9.5m (harga belian). Harga belian tersebut tertakluk kepada terma dan syarat dalam LO pertama, perjanjian kemudahan induk ('PKI'), surat ikatan penyerahhakan ('SIP'), debentur, perjanjian jualan aset ('PJA') dan perjanjian belian aset ('PBA') dan LO tambahan (LO kedua). Perayu pertama bersetuju untuk menerima tawaran responden tertakluk kepada terma dan syarat terkandung di dalam perjanjian tersebut di atas. Kemudahan Bai al-Inah adalah bertujuan untuk membina dan membangunkan pusat kemudahan data dan perayu akan membayar kadar keuntungan bagi pembiayaan tersebut pada 7% setahun dikira pada baki harian yang dikira 12 bulan lebih awal untuk tahun pertama. Keuntungan bagi tahun yang berikut hendaklah dibayar setiap suku tahun lebih awal. Perayu pertama telah bersetuju untuk membayar jumlah pokok secara ansuran berkuat kuasa dari bulan ke-10 dari tarikh pembayaran. Perayu kedua telah tanpa syarat dan tidak boleh dibatalkan menjamin pelaksanaan obligasi wajar perayu pertama di bawah kontrak/perjanjian tersebut menurut jaminan peribadi/bersama dan berasingan dilaksanakan oleh perayu kedua. Perayu kedua bersetuju untuk membayar dan menyelesaikan semua wang yang kena dibayar dan perlu dibayar oleh perayu pertama kepada responden, apabila diminta tertakluk kepada terma dan syarat yang ditetapkan dalam jaminan tersebut; dan untuk menanggung rugi dan terus memampas responden semua fi, kos, caj, ganti rugi dan segala liabiliti yang ditanggung dalam penjalanan

untuk mendapatkan dan memohon untuk mendapatkan bayaran daripada perayu. Menurut perkara 11, Jadual 1 LO pertama, bulan ke-10 akan menjadi bulan Mei 2010. Perayu pertama walaupun begitu tidak membuat apa-apa pembayaran jumlah pokok pada masa seperti yang dinyatakan di dalam Jadual 1 di atas. Perayu pertama hanya membuat pembayaran pertama berjumlah RM80,000 pada 27 Julai 2010 dan bayaran kedua berjumlah RM40,000 pada 4 Ogos 2010. Ternyata kejadian peristiwa kemungkiran telah berlaku dan responden berhak untuk menghentikan pembayaran dana selanjutnya selaras dengan perjanjian. Responden masih membenarkan pembiayaan dikatakan dijadualkan semula, melalui LO kedua, dipersetujui dan ditandatangani oleh kedua belah pihak. Pembayaran jumlah pokok telah dijadualkan semula bermula pada 31 Ogos 2011. Berikutan LO kedua, jumlah berikutnya berjumlah RM3,206,189 telah diberikan kepada perayu. Syarat LO kedua juga dengan syarat jumlah akhir sebanyak RM1,437,851 hanya boleh dikeluarkan apabila pusat data telah disiapkan setelah menerima kelulusan daripada pihak berkuasa tempatan mengenai syarat tanah dan atas penerimaan sijil layak menduduki premis itu. Walaupun telah dibenarkan untuk menjadualkan semula pembayaran balik bulanan dan walaupun pengeluaran selanjutnya dibuat selaras dengan LO kedua, perayu pertama gagal dan cuai untuk membayar ansuran bulanan seperti yang dipersetujui dalam LO pertama dan kedua. Responden kemudian membuat notis untuk menarik balik yang akan dikeluarkan kepada kedua-dua perayu bertarikh 18 Julai 2012. Walaupun permintaan yang sah telah dikeluarkan kedua-dua perayu enggan mematuhi notis penarikan balik, dengan itu mendorong responden untuk memulakan tindakan sivil ini terhadap kedua-dua perayu. Di Mahkamah Tinggi, responden menuntut terhadap perayu pertama sebagai peminjam utama dan perayu kedua/defendan kedua, penjamin, bagi mendapatkan kembali wang yang kena dibayar dan perlu dibayar. Hakim Mahkamah Tinggi membenarkan tuntutan responden dan menolak kedua-dua tuntutan balas perayu dan mengawardkan kos RM50,000 yang perlu dibayar oleh perayu kepada responden. Oleh itu rayuan ini. Perayu berhujah bahawa aset sandaran dalam urus niaga Bai al-Inah tidak wujud.

Diputuskan, membenarkan rayuan dengan kos:

1 Inti pati transaksi Bai al-Inah atau kontrak dalam perkara yang dimasukkan oleh pihak-pihak hendaklah semestinya berdasarkan perkara asas yang ia mestilah melibatkan transaksi jualan dan belian semula aset seorang pembeli. Kewujudan aset dalam transaksi adalah penting kerana tanpanya kontrak sebegitu bukanlah kontrak Bai al-Inah, tetapi sesuatu lain di luar sistem Shariah (lihat perenggan 25).

2 Sijil Am Pelaburan Mudharabah dilekatkan di memo antara pejabat tidak boleh menjadi aset yang diniagakan kerana, pertama, perkara yang sama tidak disebut dalam LO, PKI, PJA dan PBA. Juga tiada apa-apa tanda bahawa sijil tersebut bertujuan menjadi aset kepada transaksi tersebut.

Kedua, ia dilekatkan kepada memo antara pejabat yang mana jelas untuk pengedaran dalaman sahaja. Sebagai memo antara pejabat, adalah diragui sama ada perayu-perayu mempunyai akses kepadanya (lihat perenggan 33–34).

3 Sijil dikeluarkan pada 26 Mei 2009 dan bertarikh 13 Julai 2009. Jelas sekali ia ditarikh kebelakangan pelaksanaan PKI, PJA dan PBA. Oleh itu jika sijil diniatkan untuk menjadi aset dalam transaksi tersebut, maka pihak tidak menghadapi sebarang masalah untuk menamakannya sebagai aset di dalam PKI, PJA dan PBA. Jelas ini tidak dilakukan. Ia juga jelas bahawa pada masa LO pertama aset ini masih belum wujud. Jika tidak ia akan dinyatakan dalam LO pertama. Sijil tersebut juga diendorskan dengan endorsmen 'TIDAK BOLEH DIPINDAHMILIK (NOT TRANSFERABLE)'. Dalam keadaan sebegitu, milikan aset tidak boleh dipindahkan kepada pembeli (lihat perenggan 34).

4 Apa yang berlaku jelas telah melanggar prinsip-prinsip termaktub kontrak Bai al-Inah yang mana Yang Arif hakim sendiri telah merujuk kepada. Ia adalah bukan patuh Shariah. Oleh itu ia bukan kontrak pembiayaan Bai al-Inah tetapi sesuatu yang lain yang tidak dikenali dalam sistem pembiayaan Shariah. Oleh itu, remedi responden juga di tempat lain dan bukan di bawah sistem pembiayaan Bai al-Inah. Responden tidak boleh mengambil kesempatan daripada sistem apabila kontrak yang dimasuki mereka tidak dikenali dalam sistem (lihat perenggan 35).]

Notes

For cases on banking facilities, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 2571–2573.

[**Editorial note:** The Court of Appeal's order dated 13 November 2015 has been set aside and the High Court's decision dated 21 March 2014 has been revived pursuant to the Federal Court's order dated 5 July 2017. Kindly refer to the last two pages of the attached PDF.]

Zainal Azhar (Sukri and Melisa Sukri with him) (Zainal Azahar & Co) for the appellant.
Wong Koh Hui & Renee Tiun (Jeff Leong, Poon & Wong) for the respondent.

Ahmadi Asnawi JCA:

[1] In the court below, the respondent/plaintiff claimed against the first appellant/first defendant being the principal borrower and the second appellant/second defendant, the guarantor, for the recovery of monies due and payable under the Shariah financing facility known as Bai al-Inah granted by the respondent to the first appellant.

A **[2]** Vide its writ and statement of claim dated 2 August 2012, the respondent sought the following orders:

(a) judgment for the sum of RM12,139,615.23;

(b) Ta'widh at 1%pa or any rate as determined by the respondent on the sum of RM12,139,615.23 from 30 June 2011 till the date of full realisation;

B

(c) cost on solicitor-client basis; and

(d) any other relief deemed necessary by the court.

C

[3] The appellants hotly disputed the said claims upon various grounds and put forth their counterclaim against the respondent, amongst others, claiming for special damages in the sum of RM172m as loss of profit suffered by the first appellant as a result of the termination of the Bai al-Inah facility by the respondent, general, exemplary and punitative damages, interest at the rate of 4%pa and costs.

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[4] After a full hearing, on 21 March 2014 the learned judge allowed the respondent's claim as prayed as the respondent had succeeded to prove its claim against both the appellants on a balance of probabilities. The learned judge also dismissed both the appellants counterclaim and awarded RM50,000 costs to be paid by the appellants to the respondent. Hence this appeal before us.

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THE BACKGROUND

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[5] Pursuant to the letter of offer dated 16 February 2009 ('first LO') the respondent had granted the first appellant Bai al-Inah financing facility with a ceiling limit of RM9.5m (principal sum). Following thereto, the respondent agreed to sell its asset to the first appellant for a staggered payment of RM14,233,200 (sale price) and the respondent shall repurchase the said asset for RM9.5m (purchase price). The said purchase was subject to the terms and conditions contained in the first LO, the master facility agreement dated 31 July 2009 ('MFA'), deed of assignment dated 31 July 2009, ('DOA'), debenture dated 31 July 2009, asset sale agreement ('ASA') and asset purchase agreement ('APA') both also dated 31 July 2009 and the supplemental letter of offer dated 18 April 2014 ('second LO').

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[6] The first appellant had agreed to accept the respondent's offer subject to the terms and conditions contained in the above aid agreements.

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[7] The Bai al-Inah facility was for the purpose of constructing and developing a data centre facility for the Kelantan State Government as set out in Schedule 1 Item 3 of the first LO dated 16 February 2009.

[8] It was also agreed that the first appellant was to pay profit rate for the said financing at 7%pa calculated at daily rest to be calculated 12 months in advance for the first year. The profit for the following years shall be paid quarterly in advance.

[9] Pursuant to Item 11 of Schedule 1 of the first LO, the first appellant had agreed to pay the principal sum by way of instalments effective from the 10th month from the date of disbursement.

[10] The second appellant had unconditionally and irrevocably guaranteed the due performance of the first appellant's obligations under the above said contracts/agreements pursuant to a personal/joint and several guarantee executed by the second appellant on 31 July 2009. The second appellant had also agreed to pay and settle all sums due and payable by the first appellant to the respondent, on demand subject to the terms and conditions stipulated in the said guarantee. The second appellant had also agreed upon demand to indemnify and keep indemnified the respondent all fees, costs, charges, damages and all liabilities incurred in the course of obtaining and seeking to obtain payments from the appellants.

[11] The first disbursement was made on 15 July 2009. Pursuant to Item 11 Schedule 1 of the first LO, the 10th month would be the month of May 2010. The first appellant though did not make any payment of the principal sum on time as stated in the above Schedule 1.

[12] The first appellant only made the first payment in the sum of RM80,000 on 27 July 2010 and the second payment amounting to RM40,000 on 4 August 2010. Apparently an event of default had occurred and the respondent was entitled to stop further payments of the funds pursuant to the agreements.

[13] Despite the event of default and at the request of the appellants, the respondent had allowed the said financing to be rescheduled vide supplemental letter of offer dated 18 April 2014 (second LO) agreed and signed by both parties. The payment of the principal sum was rescheduled to commence on 31 August 2011. Following the second LO, a subsequent sum amounting to RM3,206,189 was disbursed to the appellants.

[14] The terms of the second LO also provided that the final sum of RM1,437,851 could only be disbursed once the data centre was completed upon receipt of the approval from the local authority on the conversion of land and upon acceptance of the certificate of fitness to occupy the premises.

[15] Despite having been allowed to reschedule its monthly repayment and

despite further disbursements made pursuant to the second LO, the first appellant had failed and neglected to pay the monthly instalments as agreed in the first and second LO. The respondent then caused a notice to recall to be issued to both the appellants dated 18 July 2012.

[16] Despite a valid demand having been issued both the appellants had refused to comply with the said recall notices, thus prompting the respondent to institute this civil action against both the appellants.

THE APPEAL

[17] The appellants' appeal could broadly be grounded upon the following:

(a) the underlying asset in the Bai al-Inah transaction does not exist;

(b) the respondent had no capacity and was not licensed to deal in this kind of transaction; and

(c) double profit was imposed which clearly contravened the most basic of the Bai al-Inah principles.

[18] Only the first ground attracted our consideration.

[19] Learned counsel for the appellants submitted that the first LO, the second LO, the MFA, ASA, APA and other related security documents did not state the asset involved in the transactions therein and accordingly the parties are bound with what they had executed and cannot be rewritten for any omission. Hence the Bai al-Inah transaction herein is Shariah non-compliant.

[20] Learned counsel further submitted that the introduction of an inter-office memo together with its Mudharabah General Investment Certificate No 41098 issued on 26 May 2009 dated 13 July 2009 (see Rekod Rayuan – Jilid 3 Bahagian C(5) pp 2720–2721) which in fact is a non-transferable fixed deposit in the sum of RM10m as the asset used in the transactions was unrelated and an afterthought in contravention with the 5th condition on asset ownership and transferability (qabd).

[21] Additionally learned counsel submitted that the inter-office memo is only for the eyes of the respondent's staff internally and there was no way for the appellants to know that the same is the asset to be used in the transactions.

OUR DECISION

[22] The learned judge correctly alluded that in order to ascertain the validity of the agreements, one had to examine the features present in the Bai al-Inah transaction as applied in this case. The resolutions by the Shariah Advisory Council ('SAC') relating to the same is most pertinent. The *Shariah Resolutions in Islamic Finance by Bank Negara Malaysia*, 2nd Ed (adverted to by the learned judge) states, at p 109:

> Bai' 'Inah refers to a contract which involves sale and buy back transactions of an asset of a seller. In those transactions, the seller sells an asset to the buyer on cash basis and then buys back the asset at a deferred price, which is higher than the cash price. It may also be conducted where the seller sells the asset to the buyer at a deferred price and subsequently buys back the asset on cash basis at a lower price than the deferred sale price. Bai' 'Inah concept is used in Malaysian Islamic Banking and Islamic capital market system to fulfil the various needs of market players, mainly during the initial development state of Islamic financial system.

[23] The learned judge also alluded to the resolutions of the SAC's 16th meeting on 11 November 2000 and 82nd meeting on 17 February 2009 mandating the following conditions to validate a Bai' 'Inah contract (found at p 113, *Shariah Resolutions in Islamic Finance by Bank Negara Malaysia*, 2nd Ed):

(a) the contract must consist of two clear and separate contracts, namely a purchase and sale contract;

(b) no stipulated condition in the contract to re-purchase the asset;

(c) both contracts are concluded at different times;

(d) the sequence of each contract is correct, whereby, the first sale contract shall be completely executed before the conclusion of the second sale contract; and

(e) transfer of ownership of the asset and a valid possession (qabd) of the asset in accordance with Shariah and current business practice ('urf tijari').

[24] The position was correctly summarised by the learned judge as follows:

> – the Bai al-Inah contract shall consist of two clear and separate contracts termed as the Asset Sale Agreement ('ASA') and the Asset Purchase Agreement ('APA') respectively with no express provision or condition in the contract to repurchase the asset. The ASA and APA must stand alone and not tied to one another. Both the ASA and APA must be concluded at different times, which meant that the ASA shall be completely executed before the conclusion of the APA. There must also be transfer of ownership of the asset and a valid possession of the asset in accordance with Shariah and current business practice.

[25] In our view the essence of Bai al-Inah transaction or contract in the matter before us as entered into by the parties herein must necessarily be grounded upon the basic premise that it must involve the sale and buy back transactions of an asset of a seller. The existence of the asset in the transactions is an imperative without which such contract is not a Bai Al Inah contract, but something else outside the Shariah system.

[26] We shall now investigate the relevant security documents.

[27] Item 4 of Appendix 1 of the APA (at p 405 to 409 of RR–*Jilid 3 Bahagian BB*) relating to the 'Description of the Asset' states that the same is 'As set out in letter(s) of Offer (If any)'. In the entire agreement this is the only reference relating to the asset in issue. The APA is dated 31 July 2009.

[28] Item 4 of Appendix 1 of the ASA (at pp 399–404 of the same *Jilid*) speaks in similar terms in respect of the description of the asset. In the entire agreement this is the only reference relating to the asset in issue. The ASA is also dated 31 July 2009.

[29] Section 1.02 of article 1 of the MFA (found at pp 303–398 of the same *Jilid*) provides:

> In accordance with the financing procedure under the *Shariah* contract of Bai al-Inah, MDV will sell the Asset (as defined herein) to the Customer at the Asset Sale Price (as defined herein) on deferred payment basis and subsequently thereafter MDV will purchase back the asset from the customer at the Asset Purchase Price (as defined herein) upon the terms and conditions herein.

Meanwhile s 2.01(a) of article 2 provides the definition of asset:

> Asset means the *Shariah*-compliant asset more particularly described in the Schedule 1A herein and 'Asset' shall be construed accordingly.

Schedule 1A of the MFA provides the *'Description of Asset'* as *'As set out in Letter(s) of Offer (if any)'*.

[30] We have tooth-combed the first LO, its schedules and appendixes (at p 197–216 of the same *Jilid*). We could find no mention of any asset in the first LO to be transacted in the MFA, ASA and APA. We have similarly tooth-combed the second LO (at pp 291–295 of the same Jilid). There is equally no mention of any asset in the second LO to be transacted in the relevant MFA, ASA and APA.

[31] The issue of non-existence of the said asset was fiercely contested by the appellants in the court below. In respect of the same SP1, for the respondent

who professed and appeared profoundly ignorant of the Bai al-Inah financing contract was evasive but finally said that the security documents does not state the asset in question. A

[32] SP2 who also appeared immensely ignorant of Bai al-Inah contract finally agreed that the asset was not stated in the MFA, ASA and APA. The transactions were devoid of any asset. SP3 in his testimony did not at all mention any asset. B

[33] On the factual matrix of the case enumerated above, it is apparent that at the time the security documents (MFA, ASA and APA) were executed on 31 July 2009, the underlying asset in the Bai al-Inah contract does not appear to exist. At the risk of being repetitive, in the MFA and both the ASA and APA, the description of the asset were merely referred to *'As set out in Letter(s) of Offer (if any)'*. As said earlier, the first and second LO did not mention any asset whatsoever. Hence it begs the question what actually was being transacted on 31 July 2009 between the seller and the purchaser in the MFA, ASA and APA. There are uncertainties in the underlying feature of the said Bai al-Inah contract/financing ie the existence of the asset in the transactions. Following through, hence the akad to sell and the akad to purchase the asset are not certain and distinct in the absence of the same, a fundamental requirement under the Bai al-Inah contract. C D E

[34] We are also of the view that the Mudharabah General Investment Certificate No 41098 attached to the inter-office Memo (at pp 2720–2721 RR – *Jilid* 3 Bahagian C5) could not have been the asset transacted on account that, firstly, the same was not mentioned in the LOs, the MFA, the ASA and APA. Neither was there any indication that the said certificate is intended to be the asset in the said transactions. Secondly, it was attached to an inter-office memo which is obviously for internal circulation only. Being an inter-office memo, it is doubtful whether the appellants had access to the same. It was the appellants' case that they knew nothing about the existence of the said certificate. Thirdly, the certificate was issued on 26 May 2009 and dated 13 July 2009. Obviously it pre-dated the execution of the MFA, ASA and APA. As such if the Certificate was intended to be the asset in the said transactions, then the parties should encounter no difficulty in naming the same as the asset in the MFA, ASA and APA. Obviously this was not done. It is also obvious that at the time of the first LO (dated 16 February 2009), this asset has yet to come into being. Otherwise it would have been stated in the first LO. Finally, the said certificate was endorsed with the endorsement *'TIDAK BOLEH DIPINDAHMILIK (NOT TRANSFERABLE)'*. In such event, the ownership of the asset cannot be transferred to the purchaser. The said endorsement plainly violated the condition of complete transferability of ownership of the said asset and valid possession (*qabd*) of the said asset in accordance with Shariah and current F G H I

business practice ('urf tijari') as resolved by the resolution of the SAC adverted to in para 22 above.

[35] In our view what had transpired obviously had violated the entrenched principles of Bai al-Inah contract as stated in paras 21–22 enumerated earlier which the learned judge herself had alluded to. It is neither Shariah compliant. As such it is not a Bai al-Inah financing contract but something else unknown in the Shariah financing system. Hence the respondent's remedy is also elsewhere and not under the Bai al-Inah financing system. The respondent cannot take advantage of the system when the contract they entered into is unknown in the system.

COUNTERCLAIM OF THE APPELLANT AT THE HIGH COURT

[36] The appellant had brought a counterclaim against the respondent (paras 28–53 *Pernyataan Pembelaan Terpinda dan Tuntutan Balas Terpinda*) for *'Ganti rugi Khas berjumlah RM172 juta sebagai kerugian/keuntungan (loss of profit) yang ditanggung oleh Defendan Pertama, Ganti rugi Am, Ganti rugi Teladan, gantirugi punitative*' interest and costs. The learned judge had dismissed the counterclaim on the grounds that the appellants had failed to prove their counterclaim on the standards required by law (para 86 of the grounds of judgment).

[37] We note that the *Notis Rayuan* filed by the appellants was only against the whole of the decision that allowed the respondent's claim in the sum of RM12,139,815.23 until 30 August 2012 with cost. There was as such no appeal brought against the dismissal of the appellants' counterclaim. Notwithstanding that, the appellants in their written submissions filed in this appeal included submissions on why their counterclaim should be allowed. This however was not pursued in the oral submissions before us.

[38] From the pleadings of the appellants the counterclaim was allegedly for projected loss of profit over a 30 year period arising from 'breach of contract' by the respondent. The evidence on this before the trial court was merely 'calculations' and estimates (reduced to RM46m in their written submissions).

[39] In our view since there was no specific appeal against the dismissal of the appellants' counterclaim, the learned judge's decision thereto ought not to be interfered with. In any event it was also our view that the learned judge did not err in disallowing the counterclaim as it was not supported by any concrete evidence of loss suffered or likely to be suffered by the appellant apart from being purely based on remote possibilities and conjectures only.

CONCLUSION

ACCORDINGLY

[40] The appeal of both the appellants against the decision of the High Court of 21 March 2014 ordering judgment in favour of the respondent is allowed with costs.

[41] Orders of the High Court that the appellants pay the respondent:

(a) *jumlah wang sebanyak RM12,139,615.23 setakat 30 Jun 2012;*

(b) *kos pampasan pada kadar 1% setahun atau pada kadar lain yang ditetapkan oleh plaintif ke atas RM12,139,615.23 mulai 30 Jun 2012 sehingga tarikh penyelesaian penuh; dan*

(c) *kos sebanyak RM50,000.*

are hereby set aside.

[42] The order of the High Court dismissing the counterclaim of the appellants is affirmed.

[43] Having heard parties further on costs and taking into particular consideration that the appellant's counterclaim had been dismissed by the High Court and such dismissal had been affirmed by us, we award the appellants costs here and below in the overall sum of RM30,000.

[44] Deposit to be refunded.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA BERSIDANG DI PUTRAJAYA

(BIDANGKUASA RAYUAN)

RAYUAN SIVIL NO. 02(f) – 52 – 08/2016 (W)

ANTARA

MALAYSIA DEBT VENTURES BERHAD **... PERAYU**
(NO. SYARIKAT: 578113–A)

DAN

1. **FLH ICT SERVICES SDN BHD** **... RESPONDEN-RESPONDEN**
   (NO. SYARIKAT: 806307–M)

2. **PAWANTEH BIN MOHAMED ZAIN**
   (NO. K/P: 640227-02-5209)

[Dalam Perkara Mengenai Mahkamah Rayuan Malaysia di Putrajaya
Rayuan Sivil No. W-02(MUA)(W)-704-04/2014

Antara

1. FLH ICT Services Sdn Bhd ... Perayu-Perayu
   (No. Syarikat: 806307-M)

2. Pawanteh Bin Mohamed Zain
   (No. K/P: 640227-02-5209)

Dan

Malaysia Debt Ventures Berhad ... Responden]
(No. Syarikat: 578113-A)

KORAM:

ZULKEFLI BIN AHMAD MAKINUDIN, PRESIDEN MAHKAMAH RAYUAN
SURIYADI BIN HALIM OMAR, HMP
RAMLY BIN HJ ALI, HMP
AZAHAR BIN MOHAMED, HMP
JEFFREY TAN KOK WHA, HMP

DALAM MAHKAMAH TERBUKA
PADA 5 HARIBULAN JULAI 2017

PERINTAH

RAYUAN INI ditetapkan untuk pendengaran pada hari ini dalam kehadiran Yoong Sin Min (Choo Kuei Yee bersamanya), peguamcara bagi pihak Perayu dan Sukri Bin Haji Mohamed (Zainal Azahar Bin Mohd Zain, Melissa Sukri dan Nurdiana Binti Haji Zainal Azahar bersamanya), peguamcara bagi pihak Responden-Responden **DAN SETELAH MEMBACA** Rekod Rayuan yang difailkan di sini **DAN SETELAH MENDENGAR** hujahan-hujahan pihak-pihak yang tersebut di atas **MAKA ADALAH DENGAN SEBULAT SUARA DIPERINTAHKAN** bahawa:

1) Rayuan ini dibenarkan;

2) Perintah Mahkamah Rayuan bertarikh 13.11.2015 diketepikan dan Penghakiman Mahkamah Tinggi bertarikh 21.3.2014 dihidupkan semula;

3) Kos sebanyak RM50,000.00 dibayar oleh Responden-Responden kepada Perayu tertakluk kepada fi alokatur sebagai kos di Mahkamah Tinggi , di Mahkamah Rayuan dan Mahkamah Persekutuan; dan

4) Deposit dikembalikan kepada Perayu.

DIBERI dibawah tandatangan saya dan Meterai Mahkamah pada 5 haribulan Julai 2017.

ENG KAR WEI

PENOLONG KANAN PENDAFTAR
MAHKAMAH PERSEKUTUAN MALAYSIA
PUTRAJAYA

PERINTAH ini difailkan oleh Tetuan Shook Lin & Bok, peguamcara Perayu yang beralamat di Tingkat 20, Bangunan Kumpulan AmBank, 55 Jalan Raja Chulan, 50200 Kuala Lumpur. Tel. 03–20311788; Faks. 03-20311775/8/9

[Ruj: CKY/YSM/12662/16/MDV/FLH&ANOR/05 – 2028983]